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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY, REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, FOR THEMSELVES AND FOR AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
PETITIONERS,

V.

FIRST SECURITY BANK OF UTAH, N.A.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners Randolph C. Hackford, et al., reply to arguments first raised in the Brief for Respondent First Security Bank of Utah, N.A.,* and discuss herein important new decisions of this Court rendered at the conclusion of the 1982 term which are dispositive against the arguments advanced by Respondent.

OPINION BELOW

The opinion of the Court of Appeals is now reported at CCH Fed. Sec. L. Rep. ¶99,402 (10th Cir., Jan. 31, 1983).

REASONS FOR GRANTING THE WRIT

I

THE BANK'S RESPONSE IS INAPPROPRIATE

The suggested "Questions Presented" at the first page of Br. and the largest part of the discussion which follows, diverts attention to matters not material to the opinion of the Court of Appeals and is an inappropriate response to a Petition of Certiorari. [See Rules 17 and 21.1(g) of this Court.] In consequence, this Court is deprived of meaningful discussion of the critical issues posed by this Petition, which is the proper function of the certiorari process.

The Bank's response, furthermore, argues mere *theories*, never adopted by the court below, including the following:

1. The arguments at Br. 8-12, that the *acts* of the Bank in selling the shares of the range corporations were not previously adjudicated, fail to address the *issues* on which *Affiliated Ute* is conclusive. The opinion below was clearly

*The Brief for Respondent is referred to herein as "Br." Otherwise, all abbreviations, including case citations, follow the style of the Petition.

based upon the three *purely legal conclusions* set out at pages 1 and 30 of the Petition of (1) no Rule 10b-5 duty, (2) no fiduciary relationship and (3) that *Affiliated Ute* would not be "follow[ed]." Particular acts in selling the shares are irrelevant to those issues.

2. Neither the Court of Appeals nor the trial Court adopted, or even made reference to, the Bank's theory that the range shares should be valued as "stock." (Br. 7) Counsel for Respondent candidly explained at trial that *no evidence was being offered* on the question of value of the range land, even though the trial judge ruled that the breach of trust question would be determined by whether Petitioners were paid a fair value *for the land* (App. C, 84, 86):

> MR. QUINN: We're not attempting by this witness [Darwin Nielson], Your Honor, to introduce any testimony *with respect to the underlying value of the real estate*. We're here dealing with the value of the grazing rights. (Tr. 1285.) (Emphasis added.)

Arguments to the contrary at Br. 7 mislead by obscuring the fatal evidentiary flaw in the opinion below, in which the *only* evidence of value of 172,000 acres of land is the expert testimony of Plaintiffs' appraiser. That evidence, moreover, was stipulated as to qualifications and corroborated by the opinions of the Indian owners. The Bank's "experts" on the value of "stock" are simply not material to the issue that was decided below. See App. A, 20-21, App. C, 88, 96.

3. The Court of Appeals did not address, in any way, the statute of limitations question raised at Br. 8. That argument is clearly diversionary, for the Bank concedes that under any circumstances many of Petitioners could not be time-barred.

4. Neither does the opinion below contain any distinction between the "facilitat[ing]" of mixed-blood sales, found by this Court to be fraudulent at 406 U.S. 128, 153, and the direct sales activity herein, as urged at Br. 11-12. The Court of Appeals did not, in fact, even discuss in any meaningful way the sales activity involved in this case. Were there such a distinction, it would be of no comfort to the Bank, for direct sales by a fiduciary is involvement of a higher order than merely facilitating the sales of others.

II

SUMMARY REVERSAL SHOULD BE GRANTED UNDER THIS COURT'S RECENT DECISIONS

Despite the urging of Respondent at Br. 3 that there was no fiduciary duty to Indians who were not named beneficiaries and at Br. 19-21 that the "good faith" and "reasonableness" standards applied in the courts below are not questions of significance, this Court's decision in *United States* v. *Mitchell*, ... *U.S.* ....., 51 U.S.L.W. 4999 (U.S., June 27, 1983), announced subsequent to the filing of the Petition, indicates the importance of those questions and that reversal is appropriate.

1. Justice Marshall's opinion for the Court in *Mitchell* contains the following holding pertinent to the Bank's argument that there was no fiduciary relationship:

> Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[*W*]*here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies*

> *or properties . . . even though nothing is said expressly . . . about a trust fund, or a trust or fiduciary connection.*" 51 U.S.L.W. 5004-05 (citations omitted, emphasis added)

The Court of Appeals denied the existence of a fiduciary duty herein, even though the Bank was substituted in the role of the United States as fiduciary (see Petition 2) and held the stock of every mixed-blood,* and even though the courts below purported to apply the same trust standards as apply to the Government in similar circumstances (see Petition 27).

2. The Bank's urging of "a good faith or reasonableness test" (Br. 19) is inconsistent with this Court's holding in *Mitchell* that (a) the Government's trust duties include "managing the Indian [property] so as to obtain the greatest revenue for the Indians . . ." (51 U.S.L.W. 5004) and (b) that there is a breach of trust "if the Secretary's duties are not perofrmed" *as prescribed by "statutes and regulations*, which clearly require that the Secretary" so act (51 U.S.L.W. 5005, emphasis added). That holding takes on added significance when considered in conjunction with the virtually simultaneous denial of certiorari in *United States* v. *Duncan*, 51 U.S.L.W. 3932 (U.S., June 28, 1983), for the holdings of the Court of Claims relied upon at page 25 of the Petition are now the holding of this Court in *Mitchell*. That circumstances, no doubt, accounts for the summary disposition of *Duncan*.

The Bank's agreement to protect the private treaty, discussed by Justice Blackmun in *Affiliated Ute*, is an obligation *created by statute* such as was referred to in *Mitchell*. That duty is acknowledged by the Bank to have been ignored

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*It is uncontroverted that the Bank held the stock certificates of all 490 mixed-bloods, including those who were not named trust beneficiaries. See Exhibits 90, 91, 92 and 93. *Cf.* 406 U.S. 128, 137.

at Br. 19. The Bank may not slide over that default, as it attempts to do with its urging that the BIA changed the policy so that it protected the "Tribe," for whom BIA remained guardian and trustee, and not the "*members* of the tribe," (see 25 U.S.C. §677n, App. E at 149), for whom the Bank was fiduciary. That argument will not withstand even a casual analysis. The Bank, not BIA, had the duty to administer the private treaty in its capacity as transfer agent. BIA had no authority to eliminate protective provisions mandated by an Act of Congress.

* * * *

Petitioners' complaint is thus plainly not against any policy adopted by Congress. To the contrary, Petitioners seek to enforce the legislative policy. Congress imposed adequate protections when it devised the private treaty and directed that a commercial fiduciary be established to administer that provision. The complaint is with the Bank's default in implementing that protection. The Bank, and the Bank alone, had those duties, and now has the responsibility for their breach.

On the facts that the Bank acknowledges, *Mitchell* and *Duncan* hold that there was both a trust and a breach, and *Arizona* v. *California* requires that the holding of *Affiliated Ute* on the trust and Rule 10b-5 duty questions be applied herein. Following these recent decisions in this Court, remanding those questions for further consideration of the courts below would be a needless squandering of judicial energy.

III

THE BANK'S ARGUMENTS ILLUSTRATE THAT THE RANGE SHARES WERE SECURITIES

The brief in opposition presents arguments on the securities law questions which are beyond the issues presented

by the Petition. The inconsistency of those arguments, moreover, establishes that the range shares were "securities."

1. The Bank's arguments at Br. 6 "that a number of the beneficiaries did not live near the range lands" and at Br. 21 that "[t]he asset sold was not a productive trust asset" are irreconcilable with its urging that these shares were not a "security." The Bank itself concedes at Br. 16 that the expectation of "profits" which renders an arrangement a "security" under the *Forman* holding includes "capital appreciation resulting from the development of the initial investment." The trust beneficiaries, those not living near the range in particular, had no other interest. It is an agreed fact, moreover, that the mixed-bloods were promised that they would realize profits in the market that would be devedoped for their shares. See Petition, page 18 at notes 20 and 21.

The Bank is thus forced to argue inconsistently with the agreed facts when it urges at Br. 14 that "[t]he corporations were created to facilitate use of range lands by the shareholders, not as potential investments" and that "limited cattle and sheep grazing privileges . . . represented the only potential for profit for the stockholders."

2. While urging at Br. 13-14 that the court below considered numerous factors in deciding that the range shares were not a "security," the Bank fails to cite a single factor that was considered other than the provisions of state law or matters that are mere incidents of the state statute (such as that 85% of the corporations' income was to come from assessments). Clearly the factors of negotiability, voting rights and appreciation in value, which are the elements of the *federal* definition mandated by this Court's *Forman* decision (see Petition 17) were not considered.

3. On the issue of federal supremacy, an appropriate response to this Court's holding in *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) and the authorities cited at pages 14-17 of the Petition unanimously implementing that doctrine would be reference to some policy of Congress or decision by the courts allowing provisions of state law to control. The Bank cites no such authority.

4. Although the Bank asserts that "[n]o reported case . . . has ever held that stock in a nonprofit corporation . . . is a security" and is unable to conceive of non-profit corporations as an "important segment of industry" (Br. 17), it is worthy of note that other courts have in fact done so. *E.g.* Justice Traynor's important decision in *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P.2d 906 (1961). Indeed, this Court's *Forman* decision is specific in acknowledging that nonprofit corporations are securities if they meet the federal definition. Moreover, were the Bank's convoluted arguments herein to be adopted, enterprising promoters, whose schemes are usually based upon secondary market trading rather than the promise of dividends, would surely flock to the convenient "safe harbor" afforded by the decision below.

CONCLUSION

This Court should reverse or, in the alternative, direct a remand to the trial court for further proceedings consistent with *United States* v. *Mitchell*, ... U.S. ....., 51 U.S.L.W. 4999 (U.S., June 27, 1983); *Arizona* v. *California*, ... U.S. ....., 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983); and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

Respectfully submitted,

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